

Gregg M. Galardi, Esq.  
Ian S. Fredericks, Esq.  
SKADDEN, ARPS, SLATE, MEAGHER &  
FLOM, LLP  
One Rodney Square  
PO Box 636  
Wilmington, Delaware 19899-0636  
(302) 651-3000

Dion W. Hayes (VSB No. 34304)  
Douglas M. Foley (VSB No. 34364)  
MCGUIREWOODS LLP  
One James Center  
901 E. Cary Street  
Richmond, Virginia 23219  
(804) 775-1000

- and -

Chris L. Dickerson, Esq.  
SKADDEN, ARPS, SLATE, MEAGHER &  
FLOM, LLP  
333 West Wacker Drive  
Chicago, Illinois 60606  
(312) 407-0700

Counsel to the Debtors and  
Debtors in Possession

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

- - - - - x  
In re: : Chapter 11  
:  
Circuit City Stores, Inc., : Case No. 08-35653(KRH)  
et al., :  
:  
Debtors. : Jointly Administered  
- - - - - x

**DEBTORS' OBJECTION TO MOTION AND SUPPORTING MEMORANDUM OF  
POLARIS CIRCUIT CITY, LLC FOR AN ORDER (A) COMPELLING  
DEBTOR TO IMMEDIATELY PAY ADMINISTRATIVE RENT PURSUANT TO  
11 U.S.C. §§ 365(d)(3) AND 503(b), AND (B) GRANTING  
RELATED RELIEF**

The debtors and debtors in possession in the  
above-captioned jointly administered cases (collectively,

the "Debtors"),<sup>1</sup> hereby submit this objection (this "Objection") to the Motion and Supporting Memorandum of Polaris Circuit City, LLC for an Order (A) Compelling Debtor to Immediately Pay Administrative Rent Pursuant to 11 U.S.C. §§ 365(d)(3) and 503(b), and (B) Granting Related Relief (D.I. 2071) (the "Motion"). In support of this Objection, the Debtors, by and through their undersigned counsel, respectfully represent as follows:

#### **BACKGROUND**

##### **The Bankruptcy Cases.**

1. On November 10, 2008 (the "Petition Date"), the Debtors filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code.

2. On January 12, 2009, the Court entered an order authorizing the Debtors to conduct auctions for a

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<sup>1</sup> The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Circuit City Stores, Inc. (3875), Circuit City Stores West Coast, Inc. (0785), InterTAN, Inc. (0875), Ventoux International, Inc. (1838), Circuit City Purchasing Company, LLC (5170), CC Aviation, LLC (0841), CC Distribution Company of Virginia, Inc. (2821), Circuit City Properties, LLC (3353), Kinzer Technology, LLC (2157), Abbott Advertising Agency, Inc. (4659), Patapsco Designs, Inc. (6796), Sky Venture Corp. (0311), Prahs, Inc. (n/a), XSStuff, LLC (9263), Mayland MN, LLC (6116), Courchevel, LLC (n/a), Orbyx Electronics, LLC (3360), and Circuit City Stores PR, LLC (5512). The address for Circuit City Stores West Coast, Inc. is 9250 Sheridan Boulevard, Westminster, Colorado 80031. For all other Debtors, the address is 9950 Mayland Drive, Richmond, Virginia 23233.

sale or sales of the Debtors' businesses as a going concern or for liquidation (D.I. 1460).

3. At the conclusion of the auction, the Debtors determined that the highest and otherwise best bid was that of Great American Group WF, LLC, Hudson Capital Partners, LLC, SB Capital Group, LLC, and Tiger Capital Group, LLC (collectively, the "Agent"). On January 16, 2009, the Court approved the Agent's bid and authorized the Debtors to conduct going out of business sales at the Debtors' remaining stores (D.I. 1634). The Agent commenced going out of business sales at the Debtors' remaining stores on January 17, 2009.

**Polaris And The Other Lessors.**

4. Certain real property lessors moved this Court, via motions or objections to relief requested by the Debtors (collectively, the "Stub Rent Motions"), for immediate payment of post-petition rent for the period from November 10, 2008 through November 30, 2008 (the "Stub Rent Requests"). The Debtors filed omnibus objections to the Stub Rent Motions on December 3, 2008 and December 18, 2008 (together, the "Stub Rent Objections") (D.I.s 641, 1100).

5. On December 3, 2008, Polaris Circuit City, LLC ("Polaris") filed its Motion and Supporting Memorandum of Polaris Circuit City, LLC for an Order (A) Compelling Debtor to Immediately Pay Administrative Rent Pursuant to 11 U.S.C. §§ 365(d)(3) and 503(b), and (B) Granting Related Relief (D.I. 647).

6. The Stub Rent Requests (including Polaris) and Stub Rent Objections were considered by the Court on December 22, 2008. After hearing the arguments, the Court denied the Stub Rent Motions, concluding that although the Stub Rent Requests are accorded priority treatment under sections 503(b)(3) and 507(a) of title 11 of the United States Code (the "Bankruptcy Code"), the Debtors are not obligated to pay the Stub Rent Requests immediately pursuant to Bankruptcy Code section 365(d)(3) or otherwise. Instead, the Court concluded that the Stub Rent Requests are administrative expenses that may be paid by the Debtors upon the effective date of a confirmed plan of reorganization pursuant to sections 507(a) and 1129(a) of the Bankruptcy Code, or such earlier date as the Court may direct for cause. Accordingly, the Court denied the Stub Rent Motions,

without prejudice to the landlord's right to seek earlier payment for their Stub Rent Request for cause. See December 22, 2008 Transcript, at pp. 82-83.

7. On January 2, 2009, in response to the Court's decision, certain lessors filed the Landlords' Motion for Rehearing and/or Reconsideration and/or to Alter or Amend the Judgment Regarding Payment of November Rent, and Memorandum in Support Thereof (D.I. 1347) (the "Reconsideration Motion"). Polaris subsequently filed its joinder to the Reconsideration Motion (D.I. 1392) on January 7, 2009.

8. On January 16, 2009, the Court denied the Reconsideration Motion and reiterated that "Debtors were not obligated to pay the stub rent immediately pursuant to Section 365(d)(3)." See January 16, 2009 Transcript, at pp. 55-58.

9. On January 26, 2009, the Court issued its Findings of Fact and Conclusions of Law from Hearing Held December 22, 2008 on Motions to Compel Payment of Postpetition Rent (D.I. 1781), clarifying its decision regarding the post-petition rental obligation for the period from November 10, 2008 through November 30, 2008

(the "Stub Rent"). The Court denied the lessors' motions and ruled "that the Debtors should not be ordered to pay the Stub Rent at this time on the basis that such rent is not entitled to a superpriority but rather to priority only pursuant to Section 507(a) of the Bankruptcy Code."

10. On February 12, 2009, the Court issued its Memorandum Opinion (the "Opinion") supplementing its rulings from the December 22, 2008 hearing (D.I. 2107). The Court reiterated its decision that the Debtors are not required to pay the Stub Rent immediately and that the Stub Rent claims shall be payable upon confirmation of a plan pursuant to section 1129(a)(9)(A) of the Bankruptcy Code.

**The Polaris Lease.**

11. Polaris and Circuit City Stores, Inc. ("Circuit City") are parties to a lease agreement dated June 15, 2004, for premises located in Columbus, Ohio (the "Lease").

12. The Debtors are currently performing their review, evaluation, and marketing of unexpired leases and subleases, including Polaris' Lease. The Lease is subject to the Bidding Procedures Order (D.I. 2242) and

the Lease is identified in the Bidding Procedures Order as a March Lease. The March Leases are scheduled for auction on March 10, 2009 with a sale hearing scheduled for March 13, 2009. Pursuant to paragraph 11 of the Bidding Procedures Order, any March Lease for which no potential purchaser has submitted a bid and the Debtors have not filed a rejection notice, shall be deemed rejected as of the later of March 31, 2009, the sale termination date, or the date that the Debtors surrender the premises to lessor by fulfilling the rejection requirements.

#### **SUMMARY OF ARGUMENT**

13. By the Motion, Polaris alleges that the Debtors owe post-petition rent and real estate taxes to Polaris in the amount of \$61,692.79, plus \$205.69 per day accruing after February 28, 2009. Polaris specifically requests that this Court order the Debtors to immediately pay: (1) the unpaid rent and real estate taxes accrued from the period from the Petition Date through November 30, 2008 (the "November Stub Rent and Taxes"); (2) real estate taxes for the period from December 1, 2008 through

February 28, 2009, in the amount of \$18,494.60,<sup>2</sup> plus \$205.69 per day for each day the Debtors remain in possession of the leased property beyond February 28, 2009 (the "Post-Petition Real Estate Taxes"); and (3) attorney's fees and costs incurred in connection with this Motion. See Motion at ¶¶ 8, 15. The Debtors object to each of Polaris' requests.

14. First, pursuant to the Court's Opinion, the request for November Rent and Taxes should be overruled absent a showing of changed circumstances. Polaris failed in its Motion to establish a change in circumstances sufficient to permit payment of the November Rent and Taxes. Additionally, the real estate taxes accrued from the Petition Date through November 30, 2008 are not yet due. Second, the Debtors have no timely obligation to pay the Post-Petition Real Estate Taxes as they are not yet due and payable pursuant to Bankruptcy

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<sup>2</sup> This figure was derived by adding the tax liability for the period from December 1, 2008 through December 30, 2008 (which was calculated by dividing the total 2008 real estate tax liability of \$75,075.97 by 366 (the number of days in 2008) and multiplying the resulting number by 31 (the number of days in December)) to Polaris' request for its estimated tax liability from January 1, 2009 onwards (\$12,135.71, plus \$205.69 per day for each day the Debtors remain in possession of the leased property beyond February 28, 2009).



Code section 365(d)(3). Moreover, the Post-Petition Real Estate Taxes are not administrative expenses entitled to immediate payment as they are neither actual nor necessary as required by Bankruptcy Code section 503(b)(1). Even assuming arguendo that the Post-Petition Real Estate Taxes are administrative expenses pursuant to section 503(b)(1), they need not be paid until confirmation of a plan, consistent with the Court's Opinion and Bankruptcy Code section 507.

15. For these reasons, as set forth more fully below, the Motion should be denied and the Objection should be sustained.

#### **OBJECTION**

##### **I. POLARIS' REQUEST FOR IMMEDIATE PAYMENT FOR NOVEMBER STUB RENT AND TAXES SHOULD BE DENIED.**

16. Courts in this District, including this Court in its Opinion, have consistently held that authorizing immediate payment of administrative expenses to landlords would be tantamount to giving landlords "superpriority" claims. See, e.g., Opinion at 13 ("decline[ing] to order immediate payment of the Stub Rent" because "[i]f the Court were to order otherwise, it

would be elevating the Lessors' administrative claim to superpriority status"); In re Trak Auto Corp., 277 B.R. 655, 668 (Bankr. E.D. Va. 2002) rev'd. on other grounds, 367 F.3d 237 (4th Cir. 2004) (holding that awarding a landlord immediate payment of administrative expenses would grant the landlord "super-priority" claim status); In re Virginia Packaging Supply Co., 122 B.R. 491, 494 (Bankr. E.D. Va. 1990) (rejecting a request for immediate payment of lease obligations because it would have the effect of granting landlords a "super-priority" status). However, there is nothing in the Bankruptcy Code that supports treating landlords as superpriority administrative creditors. See Virginia Packaging Supply, 122 B.R. at 495 (concluding that "super-priority" treatment was not "intended" by the Bankruptcy Code). Accordingly, courts in this District have repeatedly rejected immediate payment requests. See, e.g., Trak Auto, 277 B.R. at 668; In re Virginia Packaging Supply Co., 122 B.R. at 494.

17. Polaris seeks immediate payment of its November Stub Rent and Taxes. However, the Court already ruled that obligations for rent and related expenses,

including real estate taxes, from the Petition Date through November 30, 2008 are not entitled to immediate payment.<sup>3</sup> See Opinion at 2 n.3 ("As used herein, Stub Rent includes all amounts owing under the Leases, including, but not limited to, common area maintenance charges, real property taxes, and such other charges as may be asserted under the Leases for the period from November 10 to November 30, 200[8].") (emphasis added); Opinion at 12 ("the time for timely performance of the obligation to pay Stub Rent is the same as for all other administrative expense claims upon confirmation of the plan pursuant to 11 U.S.C. § 1129(a)(9)(A)"). Allowance and payment of the November Stub Rent and Taxes should await confirmation of a plan pursuant to 11 U.S.C. § 1129(a)(9)(A) to facilitate equal treatment of holders of other administrative claims. See id. As no plan has yet been confirmed, Polaris is not entitled

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<sup>3</sup> Even if the Court had not ruled in its Opinion that the November Stub Rent and Taxes were not immediately payable, the real estate taxes accrued from the Petition Date through November 30, 2008 would still not be immediately payable because they are not yet due. As stated in further detail below in Section II.A., Polaris has yet to be billed for its tax liability from the second half of 2008.

to immediate payment of its November Stub Rent and Taxes claim.

18. Moreover, there has been no change in circumstances which would allow for immediate payment of the November Stub Rent and Taxes.

19. At the December 22, 2008 hearing, the Court ruled that the Stub Rent claims are not entitled to superpriority status and the Debtors are not obligated to immediately pay them. See December 22, 2008 Transcript, at pp. 82-83. The Court further stated that its decision is "without prejudice to any landlord being able to come back for cause and requesting an earlier payment as developments in the case may dictate." See Id. at p.83.

20. Polaris asserts that because the "[leased] Premises are listed on the March Closing Stores List[, that]. . . is a sufficient change in circumstances justifying another request for immediate payment of the stub rent." Motion at ¶ 18.

21. Polaris is mistaken as there was no change in circumstances that would merit this third attempt by Polaris to receive immediate payment of its Stub Rent.

22. "The budget under the Debtors' debtor in possession financing facility, as approved by this Court by order entered December 23, 2008 (the "DIP Facility") [Docket No. 1262], did not contemplate payment of the Stub Rent for Advance Leases." Opinion at 10. The Debtors would need approximately \$20 to \$25 million to cover these Stub Rent payments. If they were forced to make immediate payments, as requested by lessors, that "would result in financial hardship for the Debtors and endanger their continued operations and successful restructuring." Id. Taking the "dire financial circumstances" into consideration, the Court exercised its discretion "to decline to order immediate payment of the Stub Rent." Id. at 13.

23. On February 17, 2009, this Court issued the Final Order Approving Third Amendment to Senior Secured Superpriority Debtor-In-Possession Credit Agreement (D.I. 2214) (the "Final DIP Order"). The Final DIP Order amends the DIP Facility to allow the Debtors to complete its liquidation.

24. The Final DIP Order approved a post-January 16, 2009 budget that does not provide for the

approximately \$20 to \$25 million needed to immediately pay Stub Rent claims. Moreover, the budget anticipated to be approved for the period from February 28 through April 4, 2009 will also not permit payment of the Stub Rent claims. The mere fact that the Debtors are currently undergoing liquidation procedures is not the change in circumstances sufficient to permit immediate payment of the November Stub Rent and Taxes.

25. Nothing has changed to permit Polaris to request immediate payment of its November Stub Rent and Taxes. The Debtors still do not have the financing necessary to satisfy all the lessors' claims for immediate payment of Stub Rent, which was the basis for the Court's decision to deny the Stub Rent Motions.

26. Accordingly, the Court should deny Polaris' third request for the immediate payment of its Stub Rent claims and its corresponding request for immediate payment its November real estate taxes.

**II. THE DEBTORS SHOULD NOT BE REQUIRED TO MAKE AN IMMEDIATE PAYMENT FOR THE POST-PETITION REAL ESTATE TAXES.**

**A. The Immediate Payment Of The Post-Petition Real Estate Taxes Is Not Required Under The Lease.**

27. The Motion requests the immediate payment of the Post-Petition Real Estate Taxes, defined above as Polaris' real estate tax liability from December 1, 2008 through 2009. This request should be denied because the Post-Petition Real Estate Taxes are not yet due under the terms of the Lease.

28. The Lease provides that "Tenant shall pay to Landlord Tenant's Pro Rata Share of Real Estate Taxes within twenty (20) days after Tenant's receipt of Landlord's statement (or within the same time period granted to the Landlord to pay such tax bill - e.g., if Landlord is delivered a copy of the bill 30 days in advance of its due date by the applicable governmental entity, then Tenant shall have 30 days after receipt of a copy of the tax bill from Landlord), accompanied by the tax bill on the basis of which such statement is rendered." Lease at ¶ 9(b).

29. Pursuant to the terms of the Lease, the Debtors have no obligation to reimburse Polaris for Post-Petition Real Estate Taxes until such taxes are due to the respective governmental entity. The only bill that Polaris presented to the Debtors was the bill requesting payment of real estate taxes from the first half of 2008. Though this bill provides the amount of the Debtors' liability for the second half of 2008, it does not require payment for such taxes. Additionally, Polaris has not presented any tax bills to the Debtors covering the 2009 tax period.

30. Upon information and belief, the Post-Petition Real Estate Taxes are not yet due to the respective governmental entity. Accordingly, pursuant to the Court's prior rulings, the Debtors are not obligated to make an immediate payment for the Post-Petition Real Estate Taxes because they are not yet due.

31. The terms of the Lease do not require an accelerated payment of the Post-Petition Real Estate Taxes. Accordingly, the Court should deny Polaris' request for the immediate payment of the Post-Petition



Real Estate Taxes as they are not yet due under the terms of the Lease.

**B. The Immediate Payment Of The Post-Petition Real Estate Taxes Is Not Required Under Either Sections 365(d)(3) Or 503(b)(1) Of The Bankruptcy Code.**

**(1) Bankruptcy Code section 365(d)(3) does not require immediate payment of the Post-Petition Real Estate Taxes.**

32. Pursuant to section 365(d)(3) of the Bankruptcy Code, the Debtors must "timely perform all the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease of nonresidential real property. . . ." 11 U.S.C. 365(d)(3).

33. As this Court has pointed out, the Bankruptcy Code does not define what it means to "timely" perform. See Opinion at 9 ("*Timely* is not a defined term in the Bankruptcy Code."). However, the Court ruled that "timely" as used in section 365(d)(3) "refers to the time of performance under the lease terms." Opinion at 12. Additionally, the Court ruled that, "the accrual method assures payment of all obligations due under a lease for postpetition occupancy on a timely basis as an administrative expense and removes the incentive to

manipulate billing cycles." Opinion at 9. Thus, as this Court has already ruled, pursuant to section 365(d)(3), the Debtors have an obligation to make an immediate payment for administrative expenses only for obligations that have both accrued and are due under the terms of the Lease. See Opinion at 12 (holding that the accrual method "does not change the temporal element of the lease term regarding payment - the time for performance of the payment obligation"); In re Pudgie's Development of NY, Inc., 239 B.R. 688, 694 ("The plain meaning of section 365(d)(3) requires that the landlord obtain payment as lease obligations become due."); In re Ernst Home Center, Inc., 209 B.R. 955, 964 (W.D. Wash. 1997) (refusing to order debtor to pay taxes not yet due under the lease because "[s]ection 365(d)(3) does not require acceleration of tax payments," but rather payment only when such obligations are due under the lease); see also, In re Metals USA, Inc., 2004 WL 771096, at \*5 (Bankr. S.D. Tex. Jan. 15, 2004) (denying landlord rent where not yet due and payable under conditions of the lease).

34. Moreover, ordering the Debtors to pay the obligations that are not yet due under the lease would

not serve the purpose behind the enactment of section 365(d)(3). As the Fourth Circuit has recognized, "[t]he intent behind the enactment of section 365(d)(3) was to prevent landlords from becoming involuntary creditors of the debtor's estate," such that landlords "cannot be required to provide post-petition services without current services." Trak Auto, 277 B.R. at 622. Where the Post-Petition Real Estate Taxes are not due to Polaris under the Lease, nor to the respective governmental entity from Polaris, Polaris is not being deprived of any of its rights. Thus, Polaris can hardly be considered a creditor at all, much less an involuntary creditor.

35. Finally, refusing to order the Debtors to make immediate payment of obligations under section 365(d)(3) before such obligations are both accrued and due respects the longstanding principle that bankruptcy law does not alter the contractual rights of parties absent some overriding federal interest. See Tidewater Finance Co. v. Kenney, 531 F.3d 312 (4th Cir. 2008) (refusing to grant creditor rights greater than those afforded under contract with debtor); Butner v. United

States, 440 U.S. 48, 55 (1979) ("Unless some federal interest requires some different results, there is no reason why [property] interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."). The principle of respecting non-bankruptcy contract rights is particularly important in this instance - not only is there no overriding federal interest in allowing Polaris to receive payment of the Post-Petition Real Estate Taxes from the Debtors, but the federal interests promoted by the Bankruptcy Code demand that Polaris is not to receive superpriority over other administrative expense creditors. See, e.g., Opinion at 13; Trak Auto, 277 B.R. at 668; Virginia Packing Supply, 122 B.R. at 495.

36. As stated above, the Post-Petition Real Estate Taxes are not yet due under the Lease. Therefore, the Court should deny Polaris' request for immediate payment of the Post-Petition Real Estate Taxes pursuant to Bankruptcy Code section 365(d)(3).

**(2) Bankruptcy Code section 503(b)(1)  
does not require immediate payment of  
the Post-Petition Real Estate Taxes.**

37. Administrative expense claims under Bankruptcy Code section 503(b)(1)(A) are limited to "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A). For an expense to be granted administrative priority under Bankruptcy Code section 503(b), the Court must find that the expense was an actual expense of the estate and that payment of the expense is necessary to preserve the Debtors' estate. See Ford Motor Credit Co. v. Dobbins, 35 F.3d 860, 866 (4th Cir. 1994) ("The modifiers 'actual' and 'necessary' must be observed with scrupulous care[.]") (citation omitted).

38. As the party filing an administrative claim, Polaris bears the burden of proving that its claim is entitled to administrative priority under Bankruptcy Code section 503. See, e.g., In re Merry-Go-Round Enterprises v. Simon Debartolo Group, 180 F.3d 149, 157 (4th Cir. 1999) (holding that the creditor "has the burden of proving that its administrative claim . . . is

an actual and necessary expense"); Ford Motor Credit Co., 35 F.3d at 866 (same).

39. Moreover, "[a]dministrative expenses are narrowly construed because they run counter to the central premise of bankruptcy distributions which is a pro rata distribution among all creditors." In re Computer Learning Ctrs., Inc., 298 B.R. 569, 577 (Bankr. E.D. Va. 2003).

40. The Post-Petition Real Estate Taxes requested in the Motion are not an "actual" cost of preserving the estate because Polaris has not yet been billed for them. See Trak Auto, 277 B.R. at 664 (stating that an amount claimed as an administrative expense "must be for an actual expense and cannot be based on an estimate"); see also, In re HNRC Dissolution Co., 371 B.R. 210, 225 (E.D. Ky. 2007), aff'd 536 F.3d 683 (6th Cir. 2008) (finding that prospective expenses are not "actual" because they are "not yet realized"); In re Federated Dept. Stores, Inc., 270 F.3d 994, 1001 (6th Cir. 2001) ("[A] tax is incurred when it accrues and becomes a fixed liability.").

41. Even if Polaris has an idea as to the total amount of its real estate tax liability for the second half of 2008, it has yet to be billed for it. Thus, these taxes are not an "actual" cost of preserving the estate. Moreover, Polaris has absolutely no knowledge as to its 2009 real estate tax liability. Despite this lack of knowledge, the Motion specifically sought \$12,135.71 for the period from January 1, 2009 through February 28, 2009, and \$205.69 per day thereafter. See Motion at ¶ 8. Polaris appears to have arrived at these figures by using an estimation based on its 2008 real estate tax liability.

42. Nor are the Post-Petition Real Estate Taxes "necessary" to preserve the estate because before the Debtors would be obligated to pay such taxes under the Lease, the Debtors will have likely rejected the Lease. Cf. HNRC Dissolution, 371 B.R. at 226 (finding no administrative expense priority when the claimed expenses would be realized only after the estate had terminated). Indeed, the Debtors would violate their duties to preserve their estates by prematurely paying the Post-Petition Real Estate Taxes before they are due.

43. The estimated Post-Petition Real Estate Taxes cannot be an "actual" or even a "necessary" cost of preserving the estate because there is no obligation on any party to pay these taxes at this time. As such, the prospective Post-Petition Real Estate Taxes should not be accorded administrative priority expense treatment under section 503(b)(1).

44. Even if this Court ultimately decides that the Post-Petition Real Estate Taxes should be accorded administrative priority expense treatment under section 503(b)(1), the Court has previously ruled that the immediate payment of section 503(b) claims are not warranted. See Opinion at 13-14 ("The Stub Rent claims under Advance Leases are hereby accorded administrative priority expense treatment under §§ 503(b) and 507(a)(2) of the Bankruptcy Code, and such Stub Rent claims shall be payable upon the effective date of any plan of reorganization in these cases, or at such other time as the Court may order upon further motion."); see also, In re Midway Airlines Corp., 406 F.3d 229, 242 (4th Cir. 2005) (noting that "[w]hile an administrative expense under § 503(b) must be paid in cash on the effective date



of the plan in a chapter 11 proceeding, . . . bankruptcy courts have wide latitude in deciding whether to order payment prior to these deadlines").

45. Accordingly, the Court should deny Polaris' request for the immediate payment of the Post-Petition Real Estate Taxes as an administrative expense claim under section 503(b)(1).

**III. POLARIS' REQUEST FOR THE IMMEDIATE PAYMENT OF ATTORNEY'S FEES AND COSTS SHOULD BE DENIED.**

**A. Attorney's Fees Are Not Immediately Payable.**

46. Polaris demands prompt payment of attorney's fees and costs associated with filing and prosecution of this Motion. See Motion at ¶ 15. In support of this request, Polaris cites the Lease, which provides for the recovery of attorney's fees and costs incurred as a result of a party's breach of the Lease to a prevailing party. See Lease at ¶ 34(f) ("In the event either party shall be required to commence or defend any action or proceeding against any other party by reason of any breach or claimed breach of any provision of this Lease, . . . the prevailing party in such action or proceeding shall be entitled to recover from or to be

reimbursed by the other party for the prevailing party's reasonable and actual attorneys' fees and costs through all levels of proceedings.").

47. As discussed below, the Debtors believe Polaris is not entitled to attorney's fees in connection with the prosecution of this Motion or its previous failed attempts to obtain the same relief sought herein.

48. However, even if Polaris were able to establish that it was entitled to attorney's fees (which it cannot), any such fees would not be not be immediately payable, as Polaris demands in its Motion. As set forth above, supra sections I and II, this Court has previously ruled that payment of administrative expense claims shall await confirmation of a plan. See Opinion at 12 ("the time for timely performance of the obligation to pay Stub Rent is the same as for all other administrative expense claims upon confirmation of the plan pursuant to 11 U.S.C. § 1129(a)(9)(A)"). Moreover, the Court has specifically ruled that the landlords' request for payment of attorney's fees is premature, explaining that "[w]ith regard to the payment of attorney's fees, the Court is not going to require the payment of attorney's fees

at . . . this time." December 22, 2008 Transcript at p.83. Accordingly, the request for attorney's fees should be denied.

**B. Attorney's Fees Are Not A "Timely Obligation" Entitled to Payment Under 365(d)(3).**

49. The Polaris attorney's fees claim should be denied because attorney's fees are not "timely obligations" entitled to payment under Section 365(d)(3).

50. As further discussed below, post-petition attorney's fees may only be allowed under two sections of the Bankruptcy Code, section 506(b) and section 503(b)(4). Nonetheless, Polaris contends that it is entitled to immediate payment of its attorney's fees claim based on section 365(d)(3), but cites no authority in support of its position. See Motion at ¶ 15.

51. The Debtors maintain that the better reasoned view, and the view that more easily fits with Congressional intent under 11 U.S.C. § 365(d)(3), was expressed by the court in In re Pudgie's Dev. Of NY, Inc., 202 B.R. 832 (Bankr. S.D.N.Y. 1996). In that case, the court denied a request for attorney's fees as an

administrative expense under section 365(d)(3), reasoning as follows:

Given the fact that section 365(d)(3) mandates a departure from the normal priority of claims, it should be strictly construed. While the statutory obligation of "timely" performance is unambiguous with respect to rent, the obligation with respect to counsel fees is not. The language employed in section 365(d)(3) suggests a Congressional purpose to grant landlords a preferred position with respect to those obligations arising under the lease in a contractually determined time frame. Thus, the statute refers in the first sentence to 'all the obligations . . . arising from and after the order for relief . . . until such lease is assumed or rejected'. This articulation makes sense in the context of the rent obligation; it does not with respect to an obligation to pay attorneys' fees, which may fortuitously arise before or after the time period in question. Similarly, the statute says the trustee "shall timely perform", using an adverb which is contractually meaningful as to rent, but not as to attorneys' fees. The legislative history provides further support for this interpretation . . . ."

In re Pudgie's Dev. Of NY, Inc., 202 B.R. at 837.

52. The above reasoning with respect to section 365(d)(3) is the reasoning that best squares with Congressional intent to "grant landlords a preferred position with respect to those obligations arising under the lease in a contractually determined time frame." Id.

Allowing attorney's fees claims under the same pretext stretches that intent beyond meaning. Consequently, the Court should deny the Polaris attorney's fees claim.

**C. Statutory Authority Does Not Support Payment Of The Attorney's Fees Claim.**

53. Polaris' claim for attorney's fees and costs should be denied because it is not made pursuant to either sections 506(b) or 503(b)(4) of the Bankruptcy Code.

54. Congress has expressly provided creditors or other entities with the right to be reimbursed reasonable attorney's fees for post-petition services in only two sections of the Bankruptcy Code. The first such instance is specified in section 506(b), pursuant to which a creditor holding an oversecured claim may receive "reasonable fees, costs or charges provided for under the agreement or State statute under which such [oversecured] claim arose." 11 U.S.C. § 506(b). The second instance is section 503(b)(4), pursuant to which the Court is directed to allow an administrative expense for "reasonable compensation for professional services rendered by an attorney . . .", but which limits such an

expense only to those "entit[ies] whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of" 503(b)(3). See 11 U.S.C. § 503(b)(4).

55. By expressly limiting the payment of post-petition attorney's fees to only those entities satisfying the requirements of sections 506(b) and 503(b)(4), Congress is presumed to have excluded the awarding of post-petition attorney's fees under any other section of the Bankruptcy Code under the principle of statutory construction of *expressio unius est exclusio alterius*. See In re Electric Mach. Enters., 371 B.R. 549, 550 (Bankr. M.D. Fla. 2007) (recognizing that "a number of courts have focused on the plain language of section 506(b) and applied the legal maxim[] of *expressio unius est exclusio alterius* to hold that unsecured creditors are not entitled to post-petition attorney's fees and costs")(emphasis in original); Bronze Group, Ltd. v. Sender (In re Hedged-Investments Assocs., Inc.), 293 B.R. 523, 526 (D. Colo. 2003) (analyzing undersecured creditor's claim for postpetition attorneys' fees and noting that the language of section 506(b) "demonstrates Congressional intent to disallow the recovery of post-

petition fees and costs by creditors whose claims are not oversecured").

56. Therefore, under well established principles of statutory construction, because Polaris' attorney's fees claim is not based on sections 506(b) or 503(b)(4), it cannot be allowed or paid pursuant to section 365(d)(3).

**D. Polaris Fails To Establish That It Is Entitled To Attorney's Fees Under The Lease Or The Bankruptcy Code.**

57. Even if the Court were to determine that, in the abstract, a party could obtain attorney's fees upon establishing such a claim, Polaris falls woefully short of meeting its burden to provide any such proof.

**(1) Polaris is not entitled to attorney's fees under the Lease.**

58. Polaris has the burden of establishing its entitlement to payment of attorney's fees. See In re Shangra-La, Inc., 167 F.3d 843, 849 (4th Cir. 1999) (stating "[e]ntitlement to attorneys' fees, however, is dependent on the terms of the lease and on state law"); Lease at ¶ 32(j) ("This Lease shall be construed in accordance with the laws of the State [Ohio] . . . .");

Painters Supply & Equip. Co. v. Wagner, No. L-07-1320, 2008 WL 203576, at \*3 (Ohio Ct. App. Jan. 25, 2008) ("Ultimately, '[t]he burden of establishing the amount and basis for an award of attorney fees rests with the party claiming entitlement to the fees.'" ) (citations omitted).

59. The Lease provides that a prevailing party may recover reasonable and actual attorney's fees and costs incurred as a result of a party's breach of the Lease. See Lease at ¶ 34(f) ("In the event either party shall be required to commence or defend any action or proceeding against any other party by reason of any breach or claimed breach of any provision of this Lease, . . . the prevailing party in such action or proceeding shall be entitled to recover from or to be reimbursed by the other party for the prevailing party's reasonable and actual attorneys' fees and costs through all levels of proceedings.") (emphasis added). Polaris does not satisfy this burden.

60. As demonstrated above, there is no breach of the Lease with respect to the November Stub Rent and Taxes or the Post-Petition Real Estate Taxes. Thus, any



claim for attorney's fees incurred by Polaris in prosecuting the Motion should be denied. Moreover, this is Polaris' third attempt to recover immediate payment of its Stub Rent claims. Surely the Lease does not contemplate payment of attorney's fees and costs for repeatedly bringing the same failed claims.

61. Accordingly, the Court should deny Polaris' requests for attorney's fees and costs. Furthermore, the Debtors specifically reserve their rights under the Lease to seek attorney's fees from Polaris in connection with the prosecution of the Motion and all prior and future disputes relating to the Lease.

**(2) Polaris fails to establish it incurred reasonable and actual attorney's fees.**

62. In order to recover attorney's fees under the Lease and applicable law, Polaris must overcome its burden to establish that it is seeking reasonable and actual attorney's fees. See Boleman Law Firm, P.C. v. U.S. Trustee, 355 B.R. 548, 553 (E.D. Va. 2006) ("The burden of proof as to the reasonableness of the requested [attorney's fees] rests with the applicant."); See also

In re Kyle Trucking, Inc., 239 B.R. 198, 203 (Bankr. N.D. Ind. 1999) ("the lessor still has the burden of proving the reasonable amount of those fees. This requires information concerning the nature of counsel's services, the time devoted to the matter and counsel's hourly rate; the same type of information that one expects in connection with any request for attorney fees."); In re Gantos, Inc., 181 B.R. 903, 908 (Bankr. W.D. Mich. 1995) (denying claimant's request for attorneys' fees, in part, because claimant "failed to specify what post-petition, pre-rejection services it provided, [and therefore] failed to support its claim for attorneys' fees pursuant to 11 U.S.C. § 365(d)(3)"). Similarly, in In re Kyle Trucking, the court disallowed claimant's administrative expense claim for attorney fees under section 365(d)(10) because the claimant did not provide sufficient information to prove its claim. See In re Kyle Trucking, Inc., 239 B.R. at 203.

63. The Motion is entirely bereft of any detail regarding the alleged attorney's fees. Polaris provides no detail regarding the scope of the work allegedly performed, the number or identity of the

attorneys performing such work, the billing rates charged for any such work, or the amount of time spent on this matter. Polaris does not even provide a range or estimate of the total amount of attorney's fees it seeks. It is impossible to determine from the Motion whether the asserted attorney's fees are actual and/or reasonable.

64. Accordingly, Polaris' attorney's fees claim should be denied.

**CONCLUSION**

WHEREFORE, the Debtors respectfully request that the Court (i) sustain this Objection, (ii) deny the Motion and (iii) grant the Debtors such other and further relief as is just and proper.

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Richmond, Virginia

SKADDEN, ARPS, SLATE, MEAGHER &  
FLOM, LLP  
Gregg M. Galardi, Esq.  
Ian S. Fredericks, Esq.  
P.O. Box 636  
Wilmington, Delaware 19899-0636  
(302) 651-3000

- and -

SKADDEN, ARPS, SLATE, MEAGHER &  
FLOM, LLP  
Chris L. Dickerson, Esq.  
333 West Wacker Drive  
Chicago, Illinois 60606  
(312) 407-0700

- and -

MCGUIREWOODS LLP

/s/ Douglas M. Foley  
Dion W. Hayes (VSB No. 34304)  
Douglas M. Foley (VSB No. 34364)  
One James Center  
901 E. Cary Street  
Richmond, Virginia 23219  
(804) 775-1000

Counsel for Debtors and Debtors  
in Possession